

No. 88-411

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In The
Supreme Court of the United States
October Term, 1988

— o —
EDWARD W. MURRAY, Director,
Virginia Department of Corrections, *et al.*,
Petitioners,

v.

JOSEPH M. GIARRATANO, *et al.*,
Respondents.

— o —
ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

— o —
BRIEF AMICI CURIAE OF THE STATES OF
GEORGIA, MISSISSIPPI, NORTH CAROLINA,
MISSOURI, SOUTH DAKOTA, WYOMING,
DELAWARE, CALIFORNIA, PENNSYLVANIA,
NEW MEXICO, INDIANA, KENTUCKY, NEW
HAMPSHIRE, NEVADA, UTAH, SOUTH CAROLINA,
OREGON, MARYLAND, IDAHO IN SUPPORT
OF PETITIONERS

— o —
WILLIAM B. HILL, JR.
Senior Assistant
Attorney General
MICHAEL J. BOWERS
Attorney General
MARION O. GORDON
First Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-9603

MICHAEL C. MOORE
Attorney General
State of Mississippi

LACY H. THORNBURG
Attorney General
State of North Carolina

WILLIAM L. WEBSTER
Attorney General
State of Missouri

ROGER A. TELLINGHUISEN
Attorney General
State of South Dakota

JOSEPH B. MEYER
Attorney General
State of Wyoming

CHARLES M. OBERLY
Attorney General
State of Delaware

JOHN VAN de KAMP
Attorney General
State of California

LEROY S. ZIMMERMAN
Attorney General
State of Pennsylvania

HAL STRATTON
Attorney General
State of New Mexico

LINLEY E. PEARSON
Attorney General
State of Indiana

FREDERIC J. COWAN
Attorney General
State of Kentucky

STEPHEN E. MERRILL
Attorney General
State of New Hampshire

BRIAN McKAY
Attorney General
State of Nevada

DAVID L. WILKINSON
Attorney General
State of Utah

TRAVIS MEDLOCK
Attorney General
State of South Carolina

DAVE FROHNMAYER
Attorney General
State of Oregon

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

JAMES T. JONES
Attorney General
State of Idaho

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PART ONE

INTEREST OF AMICI CURIAE

Amici Curiae are those states that authorize capital punishment and afford noncriminal postconviction procedures by which convicted criminal defendants may challenge their convictions and sentences. The Fourth Circuit Court of Appeals' decision in *Giarratano v. Murray*, 847 F.2d 1118 (4th Cir. 1988) (*en banc*), (constitutionally

mandating appointed counsel to represent capital defendants in state noncriminal postconviction proceedings) is truly in direct conflict with applicable decisions of this Court, and such conflict is readily apparent upon an examination of the lower court's rationale and result. Because the circuit court's opinion constitutes such a marked departure from and stands in direct conflict with this Court's precedent, amici curiae urge that Petitioner's request for certiorari be granted, that the opinion of the Fourth Circuit Court of Appeals be reversed and that stability and continuity be restored to this area of constitutional law.

PART TWO

SUMMARY OF THE ARGUMENT

In *Giarratano v. Murray*, 847 F.2d 1118 (4th Cir. 1980), (*en banc*), the Fourth Circuit Court of Appeals clearly disregarded and refused to adhere to prior applicable precedent of this Court, which precedent has consistently found the absence of a constitutional right to appointed counsel in state noncriminal postconviction proceedings. This true and direct conflict between the circuit court and this Court's opinion in *Pennsylvania v. Finley*, — U.S. —, 107 S.Ct. 1990 (1987), constitutes a sufficient basis to authorize the requested writ of certiorari. The real and intolerable disruption of state noncriminal postconviction proceedings occasioned by a constitutional mandate of appointment of counsel, the attending inquiries into habeas counsel's effectiveness and the resulting dissipation of any concept of finality of state crim-

inal proceedings, warrants the granting of Petitioner's requested writ of certiorari.

PART THREE

ARGUMENT

I. THE CIRCUIT COURT'S OPINION IN *GIARRATANO v. MURRAY*, 847 F.2d 1118 (4th Cir. 1988) (*EN BANC*), IS IN TRUE AND DIRECT CONFLICT WITH THIS COURT'S OPINION IN *PENNSYLVANIA v. FINLEY*, — U.S. —, 107 S.Ct. 1990 (1987), WHICH CONFLICT IS READILY APPARENT FROM THE CIRCUIT COURT'S RATIONALE AND RESULT.

In *Giarratano v. Murray*, 847 F.2d 1118 (4th Cir. 1988) (*en banc*), the Fourth Circuit Court of Appeals opined that, "under the unique circumstances of post-conviction proceedings involving a challenge to the death penalty" (847 F.2d at 1122), the constitutional requirement of meaningful access to the courts discussed in *Bounds v. Smith*, 430 U.S. 817 (1977), requires the appointment of counsel in state noncriminal postconviction proceedings. The circuit court's rationale and result were formulated and rendered notwithstanding its access to and examination of the Court's opinion in *Pennsylvania v. Finley*, — U.S. —, 107 S.Ct. 1990 (1987).

In *Pennsylvania v. Finley*, the Court, after a review of its relevant precedent, stated the following:

We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions (cite omitted), and we de-

cline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. (cites omitted). We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process. (cited omitted).

Pennsylvania v. Finley, 107 S.Ct. at 1993.

Revisiting its review in *Ross v. Moffitt*, 417 U.S. 600 (1974), of the defendant's claim to appointed counsel on a discretionary appeal, the Court in *Pennsylvania v. Finley*, reiterated that Respondent Moffitt's assertion has been found to be without support from either the Due Process Clause or the equal protection guarantee of the Fourteenth Amendment. As there exists no support from these constitutional sources for an asserted guarantee of counsel on a discretionary appeal, the Court in *Pennsylvania v. Finley*, concluded that "These considerations apply with even more force to postconviction review." * * * "Postconviction relief is even further removed from the criminal trial than is discretionary direct appeal. It is not part of the criminal proceeding itself, and is in fact considered to be civil in nature." 107 S.Ct. at 1994.

In an attempt to distinguish *Pennsylvania v. Finley* the circuit court remarked merely that "*Finley* was not a meaningful access case, nor did it address the rule enunciated in *Bounds v. Smith*. Most significantly, *Finley* did not involve the death penalty." *Giarratano v. Murray*, 847 F.2d at 1122.

The Court in *Pennsylvania v. Finley*, however, did address the constitutional concept of "meaningful access," noting that "meaningful access" has been afforded a defendant when he or she has been provided access to and the assistance of counsel for purposes of trial and direct appeal. 107 S.Ct., at 1994. The circuit court's observation that *Pennsylvania v. Finley*, was not a capital case adds nothing to its attempt to distinguish between *Finley* and *Ross*. Rather, the accordance of such unwarranted weight by the circuit court to this factor truly underscores the lower court's effort to disregard prior precedent of this Court and create a new *per se* rule of appointment of counsel for capital litigants in noncriminal postconviction proceedings.

Where the decision of a circuit court clearly fails to apply or adhere to prior Supreme Court precedent, certiorari is warranted. *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982). In the instant case the Fourth Circuit Court of Appeals has clearly disregarded and refused to adhere to prior Supreme Court precedent resulting in the rendition of a decision whose conflict with *Pennsylvania v. Finley*, is readily apparent. The result has been the creation of a constitutional "right" where no such right exists and the denigration of the interests of comity and finality.

CONCLUSION

Because the Fourth Circuit Court of Appeals' *en banc* decision threatens real and intolerable disruption of state postconviction proceedings, and at the very least conflict among the circuit courts regarding the proper applicable constitutional standard, and as this is a case in which this Court's certiorari jurisdiction is clearly authorized and warranted, amici curiae respectfully request that this Court grant Petitioners' request for a writ of certiorari.

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-9603